

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD GAMACHE,

Plaintiff,

No. CIV S-04-0859 RRB PAN P

vs.

BRETT WILLIAMS, M.D., etc., et al., ORDER

Defendants.

Plaintiff is a former state prisoner proceeding pro se with this civil rights action seeking relief pursuant to 42 U.S.C. § 1983. Before the court is the February 24, 2006 motion to dismiss filed by defendants James Goodnight, M.D., Ph.D., and Bruce Wolfe, M.D. The court has determined that this motion shall be submitted upon the record and briefs on file and, accordingly, the date for hearing of this matter shall be vacated. Local Rule 78-230. Upon review of the motion and the documents in support and opposition, and good cause appearing therefor, THE COURT FINDS AND ORDERS AS FOLLOWS:

In the first cause of action of plaintiff's August 9, 2005 second amended complaint, plaintiff alleges that after he was diagnosed with the Hepatitis C Virus ("HCV"), defendants refused to provide plaintiff with a liver biopsy, despite doctor's orders to provide him

1 one, refused to process plaintiff's administrative appeal seeking the liver biopsy and interferon
2 treatment, interfered with plaintiff's access to the courts and conspired to delay and/or deny
3 additional medical appointments and treatments. (Pl.'s Amended Complaint at 21.) Plaintiff
4 contends defendants were deliberately indifferent and recklessly disregarded plaintiff's serious
5 medical needs by denying him reasonable and necessary medical treatment including, but not
6 limited to, pegylated interferon with ribavirin as approved by Dr. Jerome Sands on December 12,
7 2001, and as ordered by Dr. Rachell Tortolini on April 13, 2005, and by denying and
8 unnecessarily delaying a liver biopsy ordered by defendant Dr. Bruce Wolfe in November 2003,¹
9 for the diagnosis and treatment of plaintiff's chronic HCV and cirrhosis of the liver in violation
10 of plaintiff's Eighth and Fourteenth Amendment rights. (Second Amended Complaint at 45.)
11 Plaintiff contends he suffered significant and permanent damage to his liver, advance stages of
12 cirrhosis of the liver, liver cancer, the need for a liver transplant or possible premature death, as a
13 result of defendants' conduct. (Second Amended Complaint at 45.) Plaintiff seeks monetary
14 damages and declaratory and injunctive relief.

15 Defendants Wolfe and Goodnight seek an order dismissing them from this action,
16 arguing that plaintiff has failed to state a claim against either of them.

17 In considering a motion to dismiss, the court must accept as true the allegations of
18 the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740
19 (1976), construe the pleading in the light most favorable to the party opposing the motion and
20 resolve all doubts in the pleader's favor. Jenkins v. McKeithen, 395 U.S. 411, 421, reh'g denied,
21 396 U.S. 869 (1969). Moreover, pro se pleadings are held to a less stringent standard than those
22 drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972). A motion to dismiss for failure
23 to state a claim should not be granted unless it appears beyond doubt that plaintiff can prove no
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25 ¹ Although plaintiff states in "November 2004," (Second Amended Complaint at 45), it
26 appears that was a typographical error. Plaintiff's earlier statements and exhibits confirm Dr.
Wolfe saw plaintiff on November 20, 2003. (Second Amended Complaint at 14; Ex. M.)

1 set of facts in support of the claim that would entitle him to relief. See Hishon v. King &
2 Spalding, 467 U.S. 69, 73 (1984), citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also
3 Palmer v. Roosevelt Lake Log Owners Ass'n, 651 F.2d 1289, 1294 (9th Cir. 1981).

4 In his second amended complaint, plaintiff alleges defendants Goodnight and
5 Wolfe were employed by U.C. Davis Medical Center, which is an off-site medical facility under
6 contract with the State of California and Mule Creek State Prison ("MCSP") to provide medical
7 services to inmates confined in the California Department of Corrections and MCSP. (Pl.'s
8 Second Amended Complaint at 4.) Plaintiff alleges defendants Goodnight and Wolfe were
9 specialists in the treatment of those individuals infected with HCV, and states that as
10 hepatologists, they were responsible for ordering all diagnostic examinations and medical
11 treatment, including liver biopsies and interferon treatments. (Pl.'s Second Amended Complaint
12 at 4.)

13 Plaintiff pursued administrative appeals in an effort to obtain treatment for his
14 HCV. (Pl.'s Second Amended Complaint at 9-10; 11-13.) On July 15, 2003, defendant Dr.
15 Galloway submitted a Request for Telemedicine Consultation to the Medical Authorization
16 Committee ("MAR") for approval. On July 22, 2003, the MAR Committee approved plaintiff
17 for an HCV treatment consultation. (Id., Ex. I.) On November 18, 2003, blood tests were taken
18 in preparation for the telemedicine consultation. (Id. at 13.)

19 On November 20, 2003, plaintiff was called to the prison's Emergency Room for
20 a Telemedicine Consultation with defendant Dr. Bruce Wolfe via video teleconferencing. (Pl.'s
21 Second Amended Complaint at 14.) Plaintiff alleges he asked Dr. Wolfe to order pegylated
22 interferon with ribavirin in order to prevent further damage to his liver. (Id.) Plaintiff states he
23 told Dr. Wolfe that on December 10, 2001, a Dr. Jerome Sands had ordered that treatment for
24 plaintiff because it was necessary to prevent further damage to plaintiff's liver. (Id.) Plaintiff
25 alleges Dr. Wolfe told plaintiff that because plaintiff's ALT levels were only 83, this treatment
26 was not necessary. (Id.) Plaintiff objected and made further requests for treatment. (Id.)

1 Plaintiff contends that Dr. Wolfe then completed a CDC-7221 “Telemedicine
2 Physician’s Order” form, stating he was ordering a liver biopsy to determine the current stage of
3 damage to plaintiff’s liver and to make further treatment decisions. (Id., 14 & Ex. M.) Plaintiff
4 notes defendant Debrina Williams was present during the teleconference and was aware
5 defendant Wolfe ordered a liver biopsy to be scheduled. (Id.)

6 The sole allegations concerning defendant Dr. Goodnight appear to revolve
7 around his alleged failure to intervene on plaintiff’s behalf. It is undisputed that Dr. Goodnight
8 did not examine or treat plaintiff. Indeed, the sole role Dr. Goodnight played here was to respond
9 to plaintiff’s letters to Dr. Wolfe. Plaintiff had written letters concerning defendant Debrina
10 Williams’ alleged cancellation of the liver biopsy plaintiff alleged Dr. Wolfe had ordered on
11 November 23, 2003, and plaintiff’s request that Dr. Wolfe order plaintiff to be provided with
12 pegylated interferon treatment with ribaviren to prevent further permanent damage to plaintiff’s
13 liver. (Pl.’s Second Amended Complaint at 15-16.) By letter dated March 3, 2004, Dr.
14 Goodnight responded to these letters by confirming the University of California, Davis Health
15 System was under contract to provide medical services to inmates. (Pl.’s Second Amended
16 Complaint, Ex. P.) However, Dr. Goodnight also confirmed that “[t]hese services are provided
17 upon request of the California Department of Corrections authorities.” (Id.) Dr. Goodnight then
18 took the further step of forwarding copies of plaintiff’s letters to Department representatives at
19 Mule Creek State Prison, specifically addressed to defendant Dr. Brett Williams. (Id.) Dr.
20 Goodnight further advised plaintiff that “future requests for medical services should be made to
21 Dr. Williams” at Mule Creek State Prison. (Id.)

22 Plaintiff further contends that by writing detailed letters that included his specific
23 health information, both Dr. Wolfe and Dr. Goodnight were placed on notice that the liver biopsy
24 had been cancelled and that their failure to intervene on plaintiff’s behalf would establish their
25 deliberate indifference to his serious medical needs because he would sustain permanent damage
26 to his liver.

1 A prison official acts with "deliberate indifference ... only if the [prison official]
 2 knows of and disregards an excessive risk to inmate health and safety." Gibson v. County of
 3 Washoe, Nevada, 290 F.3d 1175, 1187 (9th Cir.2002) (citation and internal quotation marks
 4 omitted). Under this standard, the prison official must not only "be aware of facts from which
 5 the inference could be drawn that a substantial risk of serious harm exists," but that person "must
 6 also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994). "If a [prison official]
 7 should have been aware of the risk, but was not, then the [official] has not violated the Eighth
 8 Amendment, no matter how severe the risk." Gibson, 290 F.3d at 1188 (citation omitted). This
 9 "subjective approach" focuses only "on what a defendant's mental attitude actually was." Farmer,
 10 511 U.S. at 839. "Mere negligence in diagnosing or treating a medical condition, without more,
 11 does not violate a prisoner's Eighth Amendment rights." McGuckin v. Smith, 974 F.2d 1050,
 12 1059 (9th Cir. 1992)(alteration and citation omitted).

13 Initially, the court notes that it is unclear that defendant Dr. Wolfe actually
 14 ordered a liver biopsy. Although plaintiff claims defendant Wolfe completed a form 7221
 15 ordering a liver biopsy and states it is appended as Exhibit M to his complaint, only three
 16 documents are appended: an inmate priority pass, a CDC 7254 form dated November 20, 2003,
 17 and a CDC 7230 form dated November 20, 2003. (Id., Ex. M.) None of these forms appear to be
 18 signed by Dr. Wolfe and none of them affirmatively state Dr. Wolfe ordered a biopsy. (Id.) The
 19 CDC 7230 form references the telemedicine conference with Dr. Wolfe, but states "Consider
 20 getting biopsy." (Id.) Such a statement is not an order requiring the biopsy to be performed. The
 21 court has reviewed all of the CDC 7221 forms appended to plaintiff's second amended complaint
 22 and none of them are dated November 20, 2003 and none appear to be signed by Dr. Wolfe.
 23 (Pl.'s Second Amended Complaint, Exs., passim.)² A showing of nothing more than a difference

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 25 ² October 29, 2001 (Ex. B); February 14, 2002 (Ex. B); June 20, 2003 (Ex. H), July 1,
 26 2003 (Ex. H); November 14, 2003 (Ex. L); May 25, 2004 (Ex. S); February 28, 2005 (Ex. G-1);
 March 13, 2005 (Ex. M-1); March 13, 2001 (Ex. P-1); August 29, 2002 (Ex. U-1); November 14,
 2003 (Ex Y-1); December 12, 2003 (Ex. A-2); August 11, 2004 (Ex. E-2); September 21, 2004

1 of medical opinion as to the need to pursue one course of treatment over another is insufficient,
2 as a matter of law, to establish deliberate indifference. Sanchez v. Vild, 891 F.2d 240, 242 (9th
3 Cir.1989); Mayfield v. Craven, 433 F.2d 873, 874 (9th Cir.1970).

4 But even if Dr. Wolfe ordered a liver biopsy to be performed on plaintiff,
5 plaintiff's complaint does not demonstrate Dr. Wolfe's deliberate indifference concerning that
6 order. Dr. Wolfe met with plaintiff by videoconference and offered his medical opinion as to the
7 medical treatment that should be performed. Plaintiff contends Dr. Wolfe wrote the following on
8 the CDC-7221 form: "(3) Schedule Liver BX for staging & fu (follow up)> results return."
9 (Pl.'s Opp'n at 7.) It is clear from the complaint and the exhibits appended thereto that medical
10 staff and doctors at the prison were in charge of scheduling these medical treatments. Plaintiff
11 has provided no facts that demonstrate Dr. Wolfe was responsible for scheduling the biopsy or
12 impeded the scheduling of the biopsy.

13 Plaintiff's complaint also does not demonstrate deliberate indifference on the part
14 of Dr. Goodnight. Dr. Goodnight responded to plaintiff's letters written to Dr. Wolfe and
15 affirmatively acted by sending the letters to Dr. Williams at the prison. Such actions on the part
16 of Dr. Goodnight do not constitute deliberate indifference under the above standards.

17 Plaintiff has provided no authority for his novel theory that writing letters to
18 specialists somehow obligates them to affirmatively act on his behalf. Unincarcerated people
19 with health problems who seek assistance of specialists are usually required to seek a referral to a
20 specialist by making an appointment with their general practitioner. Incarcerated persons are
21 similarly required to use the procedures in place to obtain referrals to specialists. Placing on
22 physicians a duty to affirmatively act based solely on a letter would unduly burden doctors and
23 would pose a case management hardship. As defendants note, the Medical Center contracts to
24 perform medical services authorized by the CDC. The telemedicine consultation with Dr. Wolfe

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26 (Ex. F-2); October 28, 2004 (Ex. H-2); and November 19, 2004 (Ex. J-2).

1 was authorized by the CDC. Dr. Wolfe then recommended that a liver biopsy be performed. But
2 that recommendation was subject to authorization by the CDC, who chose to decline to perform
3 the test. Plaintiff's remedy then was to challenge their decision, using CDC's appeal procedures,
4 which plaintiff successfully did.

5 In the instant action, it is clear from the complaint that there is no evidence that
6 Dr. Wolfe or Dr. Goodnight were responsible for the failure to promptly perform the biopsy:
7 there is nothing in the complaint to demonstrate that Dr. Wolfe or Dr. Goodnight were
8 responsible for the scheduling of the biopsy or that Dr. Wolfe or Dr. Goodnight in any way
9 hindered its performance. The delay in obtaining the liver biopsy also does not appear to have
10 been the fault of either Dr. Wolfe or Dr. Goodnight. The second amended complaint suggests
11 that it was Debrina Williams who allegedly cancelled the biopsy. Moreover, at least one form
12 appended to plaintiff's complaint suggests that orders by specialists must be submitted to a
13 prison referral committee for an ultimate decision on whether the medical procedure takes place.
14 (Pl.'s Second Amended Complaint, Ex. E-1 "CDC 7243 Physician Request Service") It appears
15 prison administrators or other prison officials were responsible for scheduling medical
16 treatments, such as a liver biopsy, and Ms. Williams told plaintiff it was her decision whether or
17 not plaintiff received one. (Pl.'s Second Amended Complaint at 15.) Ms. Williams stated: "I
18 am in charge of the hepatitis C program and I decide who qualifies for treatment. You do not
19 qualify for a liver biopsy or interferon treatment." (*Id.*)

20 Finally, plaintiff contends all of the named defendants herein "established a
21 policy, practice, custom and protocol, of referring HCV infected inmates to the Medical
22 Authorization Committee and specialists . . . as a means of delaying and/or denying liver biopsies
23 and interferon treatment" and that defendants Brett and Debrina Williams conspired with other
24 defendants to deny and delay the liver biopsy ordered on November 20, 2003. (Second Amended
25 Complaint at 28.) However, plaintiff has provided no facts to support the participation of either
26 Dr. Wolfe or Dr. Goodnight in either of these claims. The facts plaintiff has provided,

1 concerning the actions and statements of the other defendants herein, preclude the participation
2 of Dr. Wolfe or Dr. Goodnight in either of these claims.

3 In short, the second amended complaint and the exhibits appended thereto do not
4 provide a basis for a finding that either doctor was "deliberately indifferent" to plaintiff's medical
5 condition. Accordingly, plaintiff's claims against Dr. Goodnight and Dr. Wolfe should be
6 dismissed with prejudice. Although plaintiff contends he should be granted leave to amend his
7 complaint as to these two defendants, such amendment would be futile under these facts.

8 Moreover, although not set forth by defendants, the court has noted that plaintiff is
9 no longer in custody and is presently on parole. By his complaint, plaintiff sought injunctive and
10 declaratory relief and monetary damages. When an inmate seeks injunctive relief concerning an
11 institution at which he is no longer incarcerated, his claims for such relief become moot. See
12 Sample v. Borg, 870 F.2d 563 (9th Cir. 1989); Darring v. Kincheloe, 783 F.2d 874, 876 (9th Cir.
13 1986). See also Reimers v. Oregon, 863 F.2d 630, 632 (9th Cir. 1988). Plaintiff having
14 demonstrated no reasonable possibility that he will be re-incarcerated at any predictable time in
15 the future, his claims for injunctive relief have become moot. As plaintiff's allegations with
16 regard to prospective injunctive relief are mooted, it follows that plaintiff cannot maintain an
17 official capacity lawsuit for injunctive relief on the basis that a policy or procedure of the state is
18 at issue. Haber v. Melo, 502 U.S. 21, 25 (1991).

19 This action, therefore, can only proceed on plaintiff's request for money damages.
20 Thus, plaintiff's second amended complaint will be dismissed and plaintiff will be granted leave
21 to file a third amended complaint.

22 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the
23 conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See
24 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the third amended complaint must allege in
25 specific terms how each named defendant is involved. There can be no liability under 42 U.S.C.
26 § 1983 unless there is some affirmative link or connection between a defendant's actions and the

1 claimed deprivation. Rizzo v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167
2 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, vague and
3 conclusory allegations of official participation in civil rights violations are not sufficient. See
4 Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

5 Plaintiff shall omit his claims concerning defendants Wolfe and Goodnight.

6 In addition, plaintiff is informed that the court cannot refer to a prior pleading in
7 order to make plaintiff's third amended complaint complete. Local Rule 15-220 requires that an
8 amended complaint be complete in itself without reference to any prior pleading. This is
9 because, as a general rule, an amended complaint supersedes the original complaint. See Loux v.
10 Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files a third amended complaint, the
11 original pleading no longer serves any function in the case. Therefore, in a third amended
12 complaint, as in an original complaint, each claim and the involvement of each defendant must
13 be sufficiently alleged. However, plaintiff need not duplicate the exhibits plaintiff previously
14 attached to his second amended complaint.

15 Accordingly, IT IS HEREBY ORDERED that:

- 16 1. The March 30, 2006 hearing is vacated;
- 17 2. The February 24, 2006 motion to dismiss by defendants Wolfe and Goodnight
18 is granted and their claims are dismissed with prejudice;
- 19 3. Plaintiff's second amended complaint is dismissed; and
- 20 4. Plaintiff is granted thirty days from the date of service of this order to file a
21 third amended complaint that complies with the requirements of the Civil Rights Act, the Federal
22 Rules of Civil Procedure, and the Local Rules of Practice; the third amended complaint must
23 bear the docket number assigned this case and must be labeled "Third Amended Complaint";
24 plaintiff must file an original and two copies of the third amended complaint; failure to file a

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1 third amended complaint in accordance with this order will result in a recommendation that this
2 action be dismissed.

3 DATED: March 27, 2006.

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6 UNITED STATES MAGISTRATE JUDGE

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